Office-Supreme Court, U.S.
FILED
OCT 8 1964
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 570

DONALD R. LORD, BERNARD G. McGARRY, SR., McGARRY'S INC., J. E. POOR CO. INC., YE OLDE BROWN JUG INC., M. J. TOOMEY CORP., A.A.A. VENDING CO., CALLAHAN AMUSEMENT CO., MARIE G. McGARRY, JAMES HARRINGTON and CLAIRE HARRINGTON, JOHN W. GALVIN and ISABELLE GALVIN, THOMAS A. CALLAHAN, S. LEO SWARTZ and LOUIS DEFAZIO,

Petitioners,

vs.

ALVIN M. KELLEY, DISTRICT DIRECTOR AT BOSTON, UNITED STATES TREASURY DEPARTMENT, INTERNAL REVENUE SERVICE, JOHN B. FLATTERY, SPECIAL AGENT OF INTELLIGENCE AT BOSTON, UNITED STATES TREASURY DEPARTMENT, INTERNAL REVENUE SERVICE, CHARLES R. McNALLY, SPECIAL AGENT OF INTELLIGENCE AT BOSTON, UNITED STATES TREASURY DEPARTMENT, INTERNAL REVENUE SERVICE, and DONALD YOUNG, REVENUE AGENT AT BOSTON, UNITED STATES TREASURY DEPARTMENT, INTERNAL REVENUE SERVICE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Petitioners,

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ALVIN M. KELLEY, DISTRICT DIRECTOR AT BOSTON, UNITED STATES TREASURY DEPARTMENT, INTERNAL REVENUE SERVICE, JOHN B. FLATTERY, SPECIAL AGENT OF INTELLIGENCE AT BOSTON, UNITED STATES TREASURY DEPARTMENT, INTERNAL REVENUE SERVICE, CHARLES R. McNALLY, SPECIAL AGENT OF INTELLIGENCE AT BOSTON, UNITED STATES TREASURY DEPARTMENT, INTERNAL REVENUE SERVICE, AND DONALD YOUNG, REVENUE AGENT AT BOSTON, UNITED STATES TREASURY DEPARTMENT, INTERNAL REVENUE SERVICE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners hereby petition this Honorable Court for a writ of certiorari to review the judgment of the United

States Court of Appeals for the First Circuit dismissing petitioners' appeal *from that part* of the District Court's judgment which, after finding that Internal Revenue agents had conducted an illegal search and seizure, nevertheless denied an injunction against and specifically authorized the recapture by the agents of the identical books, records and papers illegally seized and leads and clues therefrom in any future proceedings.

Opinions Below

The opinion of the Court of Appeals for the First Circuit is reproduced in Appendix A to this petition at 1a*, appears at page 115 of the certified record,** and is officially reported at 334 F. 2d 742. The opinion of the District Court is reported at 223 F. Supp. 684 (D. Mass. 1963), is annexed hereto as Appendix B, and, together with the judgment of the District Court, appears at pages 66-78 of the record appendix printed for the appeal to the First Circuit, nine copies of which appendix will be filed with this petition. Supreme Court Rules 21(4), 23.

Jurisdiction

Jurisdiction is conferred on the Supreme Court under Section 1254(1), Title 28, United States Code, which provides that:

> "Cases in the Court of Appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

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* References to the Court of Appeals' and the District Court's opinion in the Appendix to this petition will be an Arabic numeral with the postscript "a".

** References to the record appendix will be designated herein "App. ——".

The judgment of the Court of Appeals for the First Circuit was entered on July 13, 1964. Their decision "dismissing the appeal for want of jurisdiction" (334 F. 2d at 746; 8a, 21a, *infra*) left standing the judgment of the District Court entered on November 19, 1963, as modified on December 4, 1963 (App. 66-67, 92-93). The judgment directed the return of petitioners' books, records and papers which had been found after a hearing to have been the subject of an illegal search and seizure conducted by agents of the Internal Revenue Service, and suppressed the use of those items, and any information or leads and clues therefrom obtained by the Government *during the period it held them, but refused to make the injunctive portion of its judgment permanent and specifically provided for the recapture of the items unconstitutionally searched for and seized with the following proviso:*

> "provided that nothing in this injunction shall preclude the United States or its agents from requiring by appropriate warrant, subpoena, summons, or other due process of law the production of any record or paper covered by the summons which Flattery signed on April 18, 1962 before he arrived at Lord's home, or shall preclude the United States or its agents from using the contents of or clues furnished by a production later than November 19, 1963." (App. 67; see also 223 F. 2d at 692).

Questions Presented

1. Is a judgment granting a return of property and a suppression thereof, *in the admitted absence of any criminal proceeding*, appealable insofar as it also denies permanent injunctive relief and specifically permits the recapture of the unlawfully seized property by process thereafter to be issued by the Government; or is it interlocutory

and non-appealable as held by the Court of Appeals for the First Circuit?

2. On the admitted facts, the record, and judgment below, are petitioners entitled to a judgment for return of their property and suppression free from a limitation which allows the recapture of their unconstitutionally seized property by agents of the Federal Government?

Constitutional Provisions Involved

United States Constitution, Fourth Amendment

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Fifth Amendment

> "No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *"

Statutes Involved

28 United States Code § 1291 (act of June 25, 1948, as amended Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348)

> **"Final decisions of district courts**
>
> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for

the District of the Canal Zone, the District Court of Guam, and he District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

28 United States Code §1292 (act of June 25, 1948, as amended Oct. 31, 1951, c. 655, §49, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, §12(e), 72 Stat. 348)

"Interlocutory decisions

"(a) The courts of appeals shall have jurisdiction of appeals from:

"(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court:"

26 United States Code §6001 (act of Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68 A Stat. 731)

"Notice or regulations requiring records, statements, and special returns

"Every person liable for any tax imposed by this title, or for the collection thereof, shall keep such records, render such statements, make such returns, and compiy with such rules and regulations as the Secretary or his delegate may from time to time prescribe. Whenever in the judgment of the Secretary or his delegate it is necessary, he may require any person, by notice served upon such person or by regulations, to make such returns, render such statements,

or keep such records, as the Secretary or his delegate deems sufficient to show whether or not such person is liable for tax under this title."

26 United States Code §7602 (act of Aug. 16, 1954, 9:45 a.m., E.D.T., c. 736, 68 A Stat. 901)

"Examination of books and witnesses

"For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

"(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

"(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry;"

Rules Involved

Federal Rules of Criminal Procedure, Rule 41(e)

"Motion for Return of Property and to Suppress Evidence. A person aggrieved by an unlawful search

and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for the use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing."

Statement of the Case

Petitioners' complaint, filed on or about November 12, 1963, as amended November 13, 1963, asked for injunctive relief in the nature of suppression and for the return of books, records, papers and documents which had been taken from the home of their accountant, petitioner Lord, by an agent and special agents of the Internal Revenue Service on April 18, 1962 through conduct which the District Court, after hearing, described as "close to extortion" (223 F. Supp. at 690; App. 74; 16a, *infra*). None of the allegations of the complaint were denied. The Government filed no appeal from the District Court's judgment which found its agents had secured petitioners' effects through illegal search and seizure, and in its brief in the First Circuit ad-

mitted the unconstitutional search and seizure (Appellees' brief below, pp. 1, 15-16). The First Circuit in its opinion agreed:

> "The agents' conduct, in other words, was without semblance of excuse, and the finding of the District Court that they knew there was none has not been, and could not be, assailed." (334 F. 2d at 743-44; 3a, *infra*)

The circumstances of the search and seizure, briefly, are these. On or about April 18, 1962, at 10:00 A.M., petitioner Lord, an accountant, received a telephone call from respondent Young, a revenue agent, who told Lord that he would be about twenty minutes late for an appointment previously made to conduct a routine audit of the books of petitioner A.A.A. Vending Co., a partnership (App. 22). This phone call had been directed by respondent Flattery, a special agent of the Internal Revenue Service, so as to conceal from Lord that Flattery and respondent McNally, another special agent of the Internal Revenue Service, were coming to Lord's home for the purpose of seizing petitioner's books and records (App. 59-61). Twenty or thirty minutes after Young's call, petitioner Lord, responding to a knock on the door of his private residence in Dedham, Massachusetts, found himself faced by Young behind whom were standing two other men (App. 22). The three agents pushed their way into Lord's residence (App. 38) and only later did the other two identify themselves as special agents Flattery and McNally (App. 23).

Petitioner Lord and his two small children were virtually kept captive in their own home by the threats, duress and coercion of these agents (App. 27-29, 30, 32). The agents told Lord not to use the telephone (App. 26). According to petitioner Lord's testimony, found by the trial court to be credible (223 F. Supp. at 690; App. 74; 16a, *infra*), Special Agent Flattery on several occasions threatened peti-

tioner Lord with jail unless he produced petitioners' records (App. 23, 25, 26-27, 32). Although Lord protested he had no authority to turn petitioners' records over to the agents, he succumbed to their duress and threats (223 F. Supp. 689; App. 69; 15a, *infra*). After Lord had been forced to bring petitioners' records from a file cabinet in his bedroom, two of the three agents proceeded to make an inventory of the records while the third, Flattery, interrogated Lord (App. 24-25, 28-34).

At the end of the day when it became apparent to petitioner Lord that the agents intended to remove petitioners' effects from his home, he again protested that he had no authority to allow them to take them (App. 26-27). He was told by Special Agent Flattery who was in charge of the raid that he had no rights, that the agents were going to take the records, and if Lord didn't cooperate with them, he would be subject to fine and imprisonment (*Ibid.*).

As the agents were departing from Lord's residence with the seized papers, Flattery left with Lord a copy of the inventory and an Internal Revenue summons form which listed some of the individuals and entities whose effects had been seized but not others and listed some individuals and entities whose papers were not found at Lord's home (Exhs. 1 and 2; App. 27, 29-30). While Special Agent Flattery contended he had the summons form in his brief case during the raid, he testified that before the illegal search and seizure the Government was unaware what books, papers, records and documents were in Lord's possession (App. 53-54).

Although repeatedly requested, orally and in writing, to return the illegally seized records, the Internal Revenue agents refused until ordered to do so by the aforesaid judgment of the District Court. Since that judgment, special agents of the Internal Revenue Service have repeatedly sought, pursuant to the judgment's proviso, to repossess the records previously ordered returned and suppressed.

Reasons for Granting the Writ

I. The Appealable Nature of the Judgment Below

The appeal dismissed below, for want of jurisdiction, was from the erroneous relief granted in an action for the return of property unconstitutionally seized by Federal agents and for injunctive relief in the nature of suppression (App. 6-15). Admittedly the action was in no way related to or affected any criminal proceeding (App. 18; Gov't. brief on appeal, p. 9), by any of the standards set forth in this Court's decision in *DiBella* v. *United States*, 369 U. S. 121, 82 S. Ct. 654 (1962), or by any other standard.* The Court of Appeals for the First Circuit, however, held that such judgments were not appealable even in the absence of the circumstances or the rationale described in *DiBella*.** This is contrary to the ruling of the Fifth Circuit in *Koenig* v. *United States*, 290 F. 2d 166 (5th Cir. 1961) which was affirmed by this Court as a companion case to *DiBella*, *supra*:

> "If there is no criminal proceeding pending, a motion for suppression of evidence and the return of such

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* The District Court held petitioners' action was "an 'independent' action * * * a civil matter and [it] should be so docketed." *Lord* v. *Kelley*, 223 F. Supp. 684, 688 (D. Mass. 1963); App. 70; 12a *infra*.

** "Appellants say that *DiBella* v. *United States*, 1962, 369 U. S. 121, indicates a contrary result. *DiBella* held against appealability in a perhaps partially comparable situation. Appellants' argument is, in effect, that because none of the reasons given by the court there in support of its decision are here applicable, we should apply a reverse English. Without passing upon the correctness of appellants' premise, it is enough to say that it does not lead to the suggested conclusion." *Lord* v. *Kelley*, 344 F. 2d at 746 (1st Cir. 1964), 8a, *infra*.

(evidential) property is an independent civil suit." 290 F. 2d at 169, aff'd. 369 U. S. 121, 82 S. Ct. 654.

The First Circuit's refusal to follow the *DiBella and Koenig* rule on appealability is also contrary to this Court's decision in *Rea* v. *United States,* 350 U. S. 214, 76 S. Ct. 292 (1956); *Carroll* v. *United States,* 354 U. S. 394, 404 n. 17, 77 S. Ct. 1332, 1338, n. 17 (1957); *United States* v. *Wallace & Tiernan Co., Inc.*, 336 U. S. 793, 802, 69 S. Ct. 824, 829 (1949), and contrary to the decision of the Ninth Circuit in *United States* v. *Rosenwasser*, 145 F. 2d 1015, 1017 (9th Cir. 1944), cited with approval, *DiBella* v. *United States,* 369 U. S. at 130, 82 S. Ct. at 660.

Petitioners' appeal to the First Circuit was not from a denial or a grant of a motion to suppress, as is the usual situation ruled on in *DiBella* and cases there cited, but from the erroneous scope of the injunctive relief granted on an express findings by the Court that an unconstitutional search and seizure had been conducted by Federal agents.* Review of the scope of relief appropriate to correct constitutional wrongs and to deter the commission of similar wrongs by Government agents has been regularly granted by the various Circuits and by this Court. *Rea* v. *United States, supra; Bolger* v. *United States,* 189 F. Supp. 237, 248-49, aff'd. 293 F. 2d 368 (2d Cir. 1961), reversed as to the state officer, 371 U. S. 392, 83 S. Ct. 385 (1963); *United States* v. *Wallace & Tiernan Co., supra*, 336 U. S. at 794 n. 1, 69 S. Ct. at 825 n. 1; *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, 51 S. Ct. 153 (1931). The First Circuit's dismissal of petitioner's appeal was a

* Neither the agents—an agent and special agents of the Internal Revenue Service and their superiors—nor the Government appealed from the District Court's judgment and findings.

departure from the principle of these decisions* as well as a weakening of the Fourth Amendment's prohibition against unreasonable searches and seizures.**

Even though the Court of Appeals felt that the judgment appealed from was "interlocutory", it should nonetheless have taken jurisdiction, pursuant to 28 U. S. C. §1292(a)(1), to review the improper denial of injunctive relief to petitioners. See *DiBella* v. *United States, supra,* 369 U. S. at 124-25, 82 S. Ct. at 657; *Bland* v. *Hartman,* 245 F. 2d 311, 314 (9th Cir. 1957).

Unless there be a right to appellate review, the danger exists that the procedures and safeguards against arbitrary action of agents of the Internal Revenue Service prescribed in *Reisman* v. *Caplin,* 375 U. S. 440, 84 S. Ct. 508, 514 (1964), will soon be eroded by the decisions below. Under *Reisman* v. *Caplin,* a proceeding to enforce an Internal Revenue Service summons requires an adversary judicial determination by a District Court of any good faith objections to the production of records, including the right to appellate review. But according to the decision below, if agents of the Internal Revenue Service abandon

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* The Court of Appeals said below:

> "However, it must clearly be that if there are no further proceedings no constitutional rights will have been denied.
>
> "This, it seems to us, indicates the answer to the question of appealability." 334 F. 2d at 745; 7a, *infra.*

If the Court meant by "further proceedings" proceedings to enforce Internal Revenue summonses, as the Government argued below, which would mean sixteen or more separate actions each with a right of appeal, the delay involved in such proceedings further demonstrates that the rule of *DiBella,* designed to prevent delay, does not apply to the present case.

** See II, *infra.*

the satutory procedure and seize the records illegally and unconstitutionally, no appellate review is available. These decisions thus may easily encourage and sanction an abandonment of orderly statutory procedures in the knowledge that there can be no appellate review and the only sanction against such unconstitutional conduct would be a temporary suppression with a right to recapture and use the "forbidden fruit" and the clues therefrom. Indeed, if the decisions below stand, a more effective deterrent can hardly be found to any attack on the unconstitutional conduct of federal agents, such as exists in this case, if in the District Court the identical records can be recaptured and there can be no appellate review from that decision.

II. Federal agents adjudged guilty of an illegal search and seizure may not recapture the seized items.

> "As the Court has noted in the past: 'The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.' See Silverthorne Lumber Co. v. United States, 251 U. S. 385, 392, 40 S. Ct. 182, 183, 64 L. Ed. 319; see also Nardone v. United States, 308 U. S. 338, 60 S. Ct. 266, 84 L. Ed. 307; Wong Sun v. United States, 371 U. S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441." *Fahy* v. *State of Connecticut*, 375 U. S. 85, 84 S. Ct. 229, 232 (1963).

The application of this principle was successfully resisted by the Government in the courts below. The lower court refused to apply the rule in the *Silverthorne* case by making permanent its injunction against the recapture of petitioners' records which it had found to have been illegally seized and left standing the proviso of its judgment of November 19, 1963 which specifically allowed such recapture.

Before the Court of Appeals, the Government argued that its authority to examine books and records and to use administrative process therefor under 26 U. S. C. §7602, notwithstanding the ruling of *Silverthorne*, allowed it to do just what the proviso said it could (Gov't brief on appeal, pp. 7, 18, 19).

Although couching its opinion in jurisdictional terms, the First Circuit assented to this erroneous constitutional doctrine by dismissing the appeal on the ground that whatever the Government might do in the future was of no present juridicial concern (334 F. 2d at 745-46; 7a). These decisions below fly in the face of the constitutionally based rule often reiterated by this Court, that where there is a constitutional right to be free from unlawful searches and seizures conducted by Government agents, there is also an adequate remedy. *Mapp* v. *Ohio*, 367 U. S. 643, 655-58, 81 S. Ct. 1684, 1692-93 (1961); *Elkins* v. *United States*, 364 U. S. 206, 210, 217, 80 S. Ct. 1437, 1440, 1444 (1960); see *Boyd* v. *United States*, 116 U. S. 616, 6 S. Ct. 524 (1886).*

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* Rule 41(e) of the Federal Rules of Criminal Procedure, which according to the Notes of Advisory Committee on Rules is a restatement of the *Silverthorne* rule, provides:

> "If the motion [for the return of illegally seized property and suppression] is granted, the property shall be restored unless otherwise subject to lawful detention and *it shall not be admissible in evidence at any hearing* or trial." F. R. Crim. P. Rule 41(e) (Emphasis supplied)

Production of petitioners' illegally seized records in response to an Internal Revenue summons which the judgment herein allows and which the Government seeks would be production in a proceeding before a hearing examiner (or the court, in an enforcement proceeding). *Reisman* v. *Caplin*, 375 U. S. 440, ——, 84 S. Ct. 508, 511-12 (1964), forbidden by the Rule. See *Boyd* v. *United States*, 116 U. S. 616, 623, 638, 6 S. Ct. 524, 528, 536-37 (1886).

Mr. Justice HOLMES, speaking for this Court in *Silverthorne Lumber Co., Inc.* v. *United States supra*, succinctly described the approach here urged by the Government and adopted by the Courts below:

> "The proposition could not be presented more nakedly. It is that although of course its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession but not any advantage that the Government can gain over the object of its pursuit by doing the forbidden act. Weeks v. United States, 232 U. S. 383, 34 Sup. Ct. 341, 58 L. Ed. 652, L. R. A. 1915B, 834, Ann. Cas. 1915C, 1177, to be sure, had established that laying the papers directly before the grand jury was unwarranted, but it is taken to mean only that two steps are required instead of one. In our opinion such is not the law. It reduces the Fourth Amendment to a form of words." 251 U. S. at 391-92, 40 S. Ct. at 182-83.*

Except for the absence here of any criminal proceeding against any of the petitioners, the facts of *Silverthorne* present a striking parallel to the present case. Here, as there, the Federal agents conducting the unlawful search and seizure claimed to have in their possession process which did not and could not justify the measures taken. 251

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* It was for the purpose of compelling production of petitioners' papers, in case the agents were prevented from making a seizure, Special Agent Flattery testified, that respondents made an inventory of those papers (Exh. 1) during their search of Lord's home. (App. 53-54).

U. S. at 391, 40 S. Ct. at 182. The search and seizure in the present case which involved the books, records, and papers of sixteen individuals and firms covering a period of several years and involving the invasion of a private dwelling house (App. 9-11, 22, 27) is even more heinous than that conducted by the agents in *Silverthorne*, and is clearly of the sort described by this Court in *United States* v. *Wallace & Tiernan Co.*, *supra*, as "the kind that has prompted this Court to hold that the Government has by wrongful conduct of its officers forfeited all opportunity to make use of evidence unlawfully seized, 336 U. S. at 799-800, 69 S. Ct. at 828.

The District Court justified the proviso in its judgment by stating that petitioners were not entitled to be free from "appropriate summons to produce those records which the tax statute required him to keep and which before the unlawful seizure the Government knew he had," (223 F. Supp. at 691; App. 76; 18a, *infra*).

The tax statute which "required" petitioners to keep records is found in Section 6001, Title 26, United States Code. That statute does not purport to be part of a regulatory scheme absent compliance with which it is unlawful to carry on the business whose income is taxed by the Internal Revenue Service. Compare *Shapiro* v. *United States*, 335 U. S. 1, 33-35, 68 S. Ct. 1375, 1392-93 (1948), and *Davis* v. *United States*, 328 U. S. 582, 587-89, 66 S. Ct. 1256, 1258-59 (1946). Even under statutes which establish conditions precedent to carrying on a business, this Court has never suggested that the right to inspect contained in such a statutory scheme renders a citizen subject to a general search of his papers for the purpose of learning whether he has anything for inspection and seizure, 328 U. S. at 591, 66 S. Ct. at 1260-61. See also *Zap* v. *United States*, 328 U. S. 624, 628-29, 66 S. Ct. 1277, 1279-80 (1946)

and *Ullmann* v. *United States*, 350 U. S. 422, 437-39, 76 S. Ct. 497, 506-07 (1956).

The suggestion that persons subject to Federal income tax thereby forfeit their constitutional rights and privileges is contrary to decisions of this Court, see *Reisman* v. *Caplin, supra,* and *Shotwell Manufacturing Co.* v. *United States,* 371 U. S. 341, 347-48, 83 St. Ct. 448, 453 (1963), and the decisions in other Circuits, *United States* v. *Silverstein*, 314 F. 2d 789, 790 (2d Cir. 1963); *In re Turner*, 309 F. 2d 69 (2d Cir. 1962); *United States* v. *Judson*, 322 F. 2d 460, 463 (9th Cir. 1963); *Austin* v. *United States*, 297 F. 2d 356, 357-358 (4th Cir. 1961); *Foster* v. *United States*, 369 F. 2d 8, 14-15 (4th Cir. 1962); *Blumberg* v. *United States*, 222 F. 2d 496, 499 (5th Cir. 1955); *Application of Daniels*, 140 F. Supp. 322, 325-28 (S. D. N. Y. 1956); *Application of House* 144 F. Supp. 95, 101-103 (N. D. Cal. 1956).

There is no distinction between the argument of the Government below that it has under its general summons and inspection power, 26 U.S.C. §7602, the right to obtain books, records and papers which its agents have illegally seized and the argument rejected by this Court in *Silverthorne Lumber Co.* v. *United States, supra*, where the Government sought to compel production of seized material by Court process.

Even if we are to credit the special agent's testimony that he had a "form Internal Revenue summons" (Exh. 2 below) in his possession prior to the raid on petitioner Lord's premises,* he did not serve it and both Courts be-

* This form summons which did not list all of the individuals whose papers were seized and listed some whose papers were not found in Lord's home (Compare Exh. 1 with Exh. 2), is the only thing in the record below on which the District Court could have based its statement that the special agent conducting the search and seizure "knew" of the records petitioners had.

low recognized that an Internal Revenue summons does not purport to be and cannot serve the office of a search warrant, 223 F. Supp. at 689, 15a; 334 F. 2d at 743, 3a; see also *United States* v. *Frankfeld*, 38 F. Supp. 1018, 1019 (D. D. C. 1941); and *Nelson* v. *United States*, 208 F. 2d 505, 512 n. 20 (D. C. Cir. 1953), cert. denied 346 U. S. 827, 74 S. Ct. 48. Federal agents who have conducted an illegal search and seizure have no right to recover the seized material that they "knew" about by the proper execution of a new search warrant or, indeed, by any other process. *Silverthorne Lumber Co., Inc.* v. *United States*, *supra; Boyd* v. *United States*, 116 U. S. 616, 6 S. Ct. 524 (1886); *Rea* v. *United States*, 350 U. S. 214, 76 S. Ct. 292 (1956); *Mapp* v. *Ohio*, *supra*. The decisions in other Circuits recognized this principle as the Courts below did not. *Hinchcliff* v. *Clarke*, 230 F. Supp. 91 (N. D. Ohio 1963); *Application of Leonardo*, 208 F. Supp. 124 (N. D. Cal. 1962); *United States* v. *Avila*, 27 F. Supp. 3 (N. D. Cal. 1963); *Application of Houlihan*, 31 F. R. D. 145 (D. N. D. 1962); *Internal Revenue Agent* v. *Sullivan*, 287 Fed. 138 (W. D. N. Y. 1923); *United States* v. *Young*, 215 F. Supp. 202 (E. D. Mich. 1962); *United States* v. *Mitchell*, 274 Fed. 128, 131 (N. D. Cal. 1921).

Once having demonstrated to the satisfaction of the District Court that their papers had been seized in violation of their Constitutional rights, petitioners were entitled to a judgment below free from the provisio which expressly allows the Government or its agents to require production of those papers by process.

The injunctive relief prayed for in the complaint was equitable in nature. All necessary parties and witnesses were before the District Court and fully heard by it. The passage of time cannot alter the facts established and the unquestioned finding of an unconstitutional search and

seizure. Under familiar equitable principles, complete relief should have been afforded petitioners in the judgment below. *Rea* v. *United States, supra;* see *Cleary* v. *Bolger,* 371 U. S. 392, 408-410, 83 S. Ct. 385, 394-95 (1963), dissenting opinion of Mr. Justice BRENNAN, the Chief Justice, concurring.

The threat of multiplicity of litigation is very real and imminent.

If the right of petitioners to be free from the proviso in the judgment is not determined now,—this single proceeding will be fragmented into sixteen or more separate, independent and distinct enforcement proceedings against the petitioners with the consequent delay occasioned by a right of appeal in each case.

Special agents of the Internal Revenue Service have already attempted to obtain the seized papers in six separate actions against petitioners to enforce Internal Revenue summonses under the proviso in the judgment below. Petitioners are entitled to relief from this constant harassment with its omnipresent threat of attachments for contempt* which is based on an invalid proviso in the judgment below, regarded by the District Court as *res adjudicata* on the Government's right to recapture the seized papers.**

The proviso in the District Court's judgment has an impact far beyond the merits of petitioners' own case. It invites agents of the Internal Revenue Service to flout the standards of orderly procedure established so recently by this Court in *Reisman* v. *Caplin, supra,* and to secure papers

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* See transcript of September 18, 1964, p. 18, filed with the Honorable ARTHUR J. GOLDBERG, Associate Justice of this Court on September 25, 1964 in support of an application for a stay herein.

** Id. at pp. 3, 13-14.

by illegal search and seizure. The sole consequences which will attend the unlawful acts of these Federal agents, according to the proviso, will be to require them to relinquish illegally seized papers for the ten day period between return of the papers and the return date of an Internal Revenue summons calling for their production. See 26 U.S.C. §7605(a).

In this country where there are now over 60 million income-taxpayers and the Internal Revenue Service conducts thousands of examinations and investigations a year,* there is no decision by a Federal Court which makes a greater number of citizens potential victims of unlawful conduct by Federal agents without effective redress than does the proviso of the judgment below.

* The Annual Report of the Commissioner of Internal Revenue for the fiscal year ended June 30, 1963 states that there were 97,832,977 returns filed, of which 62,589,213 were individual income tax returns, 1,291,039 were corporate income tax returns and 978,236 were partnership returns (Table 6, p. 91). 3.8 million returns were audited, some 807,000 field audits were conducted, and a total of 10 873 "tax fraud" investigations were conductced (Id. at 18, 23.)

CONCLUSION

For the reasons stated, it is respectfully prayed that this petition for writ of *certiorari* be granted, that the proviso of the District Court judgment of November 19, 1963 be stricken, and that the injunction be made permanent, or that the decision of the Court of Appeals for the First Circuit be vacated and the case be remanded to that Court for a determination of the appeal on the merits.

Respectfully submitted,

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[APPENDICES FOLLOW]

APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6307.

DONALD R. LORD ET AL.,

PLAINTIFFS, APPELLANTS,

v.

ALVIN M. KELLEY ET AL.,

DEFENDANTS, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[223 F.Supp. 684]

Before WOODBURY, *Chief Judge*, and HARTIGAN and ALDRICH, *Circuit Judges*.

John Warren McGarry for appellants.

John M. Brant, Attorney, Department of Justice, with whom *Louis F. Oberdorfer*, Assistant Attorney General,

Appendix A

Lee A. Jackson and *Joseph M. Howard*, Attorneys, Department of Justice, *W. Arthur Garrity, Jr.*, United States Attorney, and *Murray H. Falk*, Assistant U. S. Attorney, were on brief, for appellees.

OPINION OF THE COURT.

July 13, 1964

ALDRICH, *Circuit Judge*. On April 18, 1962 Intelligence Agents of the Internal Revenue Service, upon what was stated to be an appointment for a routine audit, entered the combined place of business and home of appellant Lord, a public accountant, and departed some hours later with three cartons of business records, bank statements, checks and stubs, etc., belonging to the other appellants, hereinafter taxpayers, which had been in Lord's custody. Even disregarding dramatic embellishments suggested by Lord in his testimony, and by counsel in argument,[1] the agents' conduct was taken either over the continued objection of Lord, or with consent obtained only by threats of personal harassment, and was in total violation, also, of the rights of the taxpayers. It is true that Flattery, the agent in charge, had in his possession a summons issued under authority of section 7602 of the 1954 Code addressed to Lord and requiring him to appear and give testimony on April 30 and to bring with him the books, records, ledgers, bank statements, cancelled checks and other papers, desig-

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[1] For example, although no force or threat of force was used in connection with the removal, counsel voiced as a special complaint that Lord's constitutional rights had been invaded in the presence of his 2- and 4-year old children.

nated in general terms, of the taxpayers here involved. The summons was served upon Lord as the agents were leaving. This summons, of course, was not a search warrant, nor did it even purport to justify anything done by the agents on April 18. The agents' conduct, in other words, was without semblance of excuse, and the finding of the district court that they knew there was none has not been, and could not be, assailed.[2]

Thereafter Lord, joined by the taxpayers, filed in the district court what they termed a "Complaint for temporary restraining order and injunction. Return of records and suppression of evidence." Named as defendants were the local District Director and the local Chief of Intelligence of the IRS, and the three agents who made the seizure. The relief asked was that all documents seized "and the oral information, statements and admissions made, and all leads and clues therefrom . . . be suppressed" and that the records, etc. be returned. Secondly, that defendants "be perpetually enjoined from using in any shape, form or manner whatever, directly or indirectly, and from . . . transferring to any person . . . any and all of such evidence illegally obtained." There were also prayers for a preliminary injunction and for general relief.

Following a hearing at which evidence was introduced the court concluded that "where a federal criminal prosecution is probable a federal trial court shall have nonstatutory jurisdiction to enjoin federal enforcement officers from holding or using property they unlawfully seized." It made detailed findings and entered a judgment ordering

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[2] The only explanation offered was that the agents intended, if there was not a "voluntary" production, to summon these records and wished to make a preliminary verification to make sure of full compliance. Expression of our views about such behavior seem hardly necessary.

all records, etc. taken from Lord returned to him, and enjoining all representatives of the IRS "and all persons who have acted in concert with them in the use of the records and papers transferred by Lord" from ever "using in any proceeding . . . any information or clues derived during the time they held such records." It further ordered that all "documents, writings, and other papers obtained from persons not parties to this action, . . . notes of interviews with and statements, affidavits and transcripts of testimony . . . and . . . work papers and other papers prepared by personnel of the Internal Revenue Service for use solely within the Government" be deposited with the Clerk of the District Court "open to inspection at any time, without restriction" by any judge or by Lord or by the taxpayers involved. The judgment continued, "[N]othing in this injunction shall preclude the United States or its agents from requiring by appropriate warrant, subpoena, summons, or other due process of law, the production of any record or paper covered by the summons" in the possession of the agents when they arrived at Lord's home. It is, essentially, from this last that appellants jointly appeal.[3] There is no cross appeal.

The first question is that of our jurisdiction. Before coming directly to this a further recitation may be in or-

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[3] The notice of appeal was "*from that part of the judgment* . . . which denied that the unlawful search and seizure constituted a violation of the rights of said parties plaintiff under the 5th amendment to the Constitution of the United States, as well as under the 4th amendment thereto; and further, which refused and denied to the said plaintiffs herein such relief sought as would perpetually enjoin said defendants herein from using the evidence illegally obtained from the books, statements, and leads and clues therefrom in any future proceedings, criminal, civil or administrative, Federal or State." Whether the search violated the Fifth Amendment as well as the Fourth does not affect our disposition of this appeal.

der. It is apparent that appellants have received all of the present relief requested. (Indeed, by a painstakingly thorough order they have received more present relief than they requested.) What they wish is that there be attached to the documents returned to them a perpetual immunity from process, civil, as well as criminal. Ostensibly, and persistently, they ask this relief in the name of restoration to the status quo, but, in fact, they ask it as a penalty.[4] The announced basis of the court's decision was that appellants were "entitled to be as well off as if Flattery had not unlawfully seized those papers, but . . . not . . . any better off".[5] It pointed out that "Flattery knew of these records before they were delivered to him. More significantly, he had already signed a summons covering those records." From this the court concluded that a total immunization of the records would not merely restore the status quo, but would deprive the government of the benefit of the knowledge it had before the incident. Appellants' response is that the record "clearly demonstrates" that the government had "no such prior independent knowledge." The justification, if any, for this statement must depend upon what is meant by the word "such." Obviously, and admit-

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[4] It was as a penalty that the district court did issue such an injunction in the recent case of *Hinchcliff* v. *Clarke*, D. C. N. D. Ohio, May 14, 1964. The court's stated reasons were that the wrongful seizure had put taxpayers to great expense; that the fact that the taxpayers wanted the documents back might of itself cause the government to believe that they were not innocent; that to rule otherwise would give the taxpayers but a "hollow victory;" and, finally, that the U. S. Attorney there, unlike his Department of Justice counterparts in the case at bar, showed "no contrition."

[5] The court went on to say that the "penalty" should not go beyond preventing the government from gaining any advantage from its "dirty hands."

tedly, the government did not have the detailed knowledge of specific records beforehand that it had afterwards. But, equally obviously, it had very considerable knowledge, as the summons conclusively establishes.

In this posture we turn to appellants' principal, and insistent, position that there is an "express provision in the judgment below that these records and other property may now be obtained by process." The court, as already quoted, *supra*, clearly made no such provision. It merely stated that it was declining to rule the reverse. When the government's brief noted the difference appellants stated in reply, "This is at best a sophistry."

We might say, parenthetically, that we have some difficulty in deciding whether appellants are clear in their own minds what they are arguing. A considerable portion of their brief is devoted to the proposition that there are constitutional objections quite apart from, and independent of, the occurrences of April 18 which would prevent their records from ever being reached, and to making contentions which, *inter alia*, might be said to disregard the fact that some of them are corporate rather than natural persons. They seem to argue that the judgment below affirmatively overruled these objections. Of course it did nothing of the sort, and such questions could not be before us. The most that is before us is whether, if some other proceeding hereafter occurs, the events of April 18 must, as a matter of law, prevent every department of the government and every agency, administrative, civil or criminal from seeing these records irrespective of what rights to do so the government would otherwise have had. When the government makes the point, on the issue of appealability, that no such proceedings have been instituted, and, con-

ceivably, never may be, appellants reply that the government is advancing "the incredible proposition that . . . unless [government] agents . . . choose to initiate proceedings to compel production of those very records, appellants should not have appellate relief from the lower Court's denial of their constitutional rights." However, it must clearly be that if there are no further proceedings no constitutional rights will have been denied.

This, it seems to us, indicates the answer to the question of appealability. We are not concerned with whether, had appellants' prayer for the return of their papers been denied, such refusal would have been appealable. *Cf. Perlman* v. *United States*, 1918, 247 U. S. 7; explained in *Cobbledick* v. *United States*, 1940, 309 U. S. 323, 328-9; *Reisman* v. *Caplin*, 1964, 375 U. S. 440, 449. With the only question before us whether it is to be ruled now that if some future proceeding is brought the government's rights will be affected by what took place hitherto, and with no assertion of what these proceedings will be, appellants are, at best, seeking declaratory relief before there is a controversy.

If we should construe the district court's judgment as an affirmative declaratory ruling against appellants in any and all possible proceedings, as distinguished from a mere refusal to rule the way they requested, we are clear that it should be regarded as an interlocutory order only. This would mean that it is subject to revision by the particular judge who entered it, or by any other, in the light of the circumstances as they may eventually develop. *Cf. The Haverhill Gazette Co.* v. *Union Leader Corp.*, 1 Cir., 1964, F. 2d ; *United States* v. *One 1946 Plymouth Sedan Automobile*, 7 Cir., 1948, 167 F. 2d 3, 8-9; see *Ideal Toy Corp.* v. *Sayco Doll Corp.*, 2 Cir., 1962, 302 F. 2d 623, 625.

We would regard this as appropriate, but make, we may add, no suggestion as to how the court's present order should be interpreted, or whether or not it may have been sound.

Appellants say that *DiBella* v. *United States,* 1962, 369 U. S. 121, indicates a contrary result. *DiBella* held against appealability in a perhaps partially comparable situation. Appellants' argument is, in effect, that because none of the reasons given by the court there in support of its decision are here applicable, we should apply a reverse English. Without passing upon the correctness of appellants' premise, it is enough to say that it does not lead to the suggested conclusion.

Judgment will be entered dismissing the appeal for want of jurisdiction.

APPENDIX B

Opinion of the United States District Court

November 19, 1963

WYZANSKI, D.J.

After being twice amended, the complaint in this case has become in effect principally, though not exclusively, a pre-indictment pleading under Federal Rule of Criminal Procedure 41(e) by Lord, as possessor, and by McGarry and other individuals, partnerships, and corporations listed in paragraph XIII of the complaint, as owners, to return records seized from Lord, by Flattery and others, and to suppress the evidentiary use of those records in any federal criminal proceeding which may be undertaken against the complainants.

These are the underlying facts.

1. McGarry and others listed in paragraph XIII of the complaint (herein called the clients) entrusted their records to a father and son, the late Alfred H. Lord and the present plaintiff Donald R. Lord, both being independent professional accountants, to prepare their tax returns. There is no credible evidence that any client, expressly or impliedly, authorized either of the Lords to permit any agent of the Internal Revenue Service to examine or to take those records.

2. Flattery, a special agent of the Internal Revenue Service, signed a summons, dated April 18, 1962, addressed to Lord, requiring him to appear on April 30 at 55 Tremont St., Boston before Flattery to give testimony relating to the tax liability of Bernard G. and Marie G. McGarry, and to bring with him designated records of the clients. With-

out initially serving this summons, Flattery, with two other special agents, went to Lord's Dedham home which was also his office.

3. Flattery was a man of sufficient experience so that he knew that unless otherwise authorized by his principal, or unless otherwise directed by a judicial order, an accountant in private practice has an obligation not to turn over his principal's records to a third party. Nonetheless, Flattery, after informing Lord that it would be prudent for him to cooperate with the special agents unless he himself wished to get into trouble, demanded the right to take his clients' records to the offices of the Internal Revenue Service. Lord, after indicating that he lacked authority voluntarily to surrender the documents, complied with the demand because he feared that if he did not do so he himself, regardless of his innocence, would be investigated or subject to proceedings initiated by the government. His compliance was not voluntary, but responded to Flattery's threats.

4. When he turned the records over to Flattery, Lord asked for some evidence to show his clients that he had yielded to compulsory process. Then, for the first time, Flattery served upon Lord the summons which, of course, was merely a command that at a date 12 days thereafter Lord should produce the records in Boston.

Upon the basis of the foregoing findings, this Court arrives at the following ultimate findings and conclusions.

The Fourth Amendment to the United States Constitution guarantees "The right of the people to be secure in their . . . papers, and effects, against unreasonable searches and seizures." When a person complains of an unreasonable search, it does not follow automatically that

this Court has jurisdiction to hear the case. Without examining all possible bases for jurisdiction, it is sufficient in the case at bar to cite Rule 41(e) of the Federal Rules of Criminal Procedure which provides that "A person aggrieved by an unlawful search and seizure may move the district court . . . for the return of the property and to suppress for use as evidence anything so obtained. . . ."

It might be supposed that Rule 41(e) gives a federal court jurisdiction to hear an aggrieved person only if he has been indicted, and if his grievance is presented as an interlocutory matter in the course of a criminal proceeding prosecuted by the United States against him as a defendant. But it is plain that this is an incorrect supposition, and that even before he has been indicted an aggrieved person may invoke the jurisdiction of a district court under some circumstances. *Di Bella* v. *U.S.*, 369 U.S. 121.

The first cases in which an aggrieved person was permitted to invoke the jurisdiction named the United States as the opposing party and involved an alleged unlawful seizure by a United States Attorney. Jurisdiction was sustained on the theory that the United States Attorney as a lawyer was an officer of the court subject to the inherent disciplinary power of any court of record. *Go-Bart Importing Co.* v. *U.S.*, 282 U.S. 344, 354-355; *Austin* v. *U.S.*, *James E. Holshouser*, 4th Cir., 297 F. 2d 356; *Grant* v. *U.S.*, 2nd Cir., 282 F. 2d 165, 168; *Centracchio* v. *Garrity*, 1st Cir., 198 F. 2d 382, 386; *U.S.* v. *Maresca*, S.D.N.Y., 266 Fed. 713, 717. That exercise of jurisdiction was certainly, to say the least, anomalous. No Act of Congress specifically authorized the federal court to take jurisdiction. *Grant* v. *U.S.*, supra. There was no criminal or civil proceeding in which it could be an interlocutory stage. *Centracchio* v. *U.S.*, *supra*. The United States as a sovereign had not agreed

to be sued. If the aggrieved person were successful, the propriety of a court restraining the United States, as distinguished from its officers, was not clearly established. And not everyone would agree that the prosecutor's unlawful seizure involved his conduct qua attorney and hence subjected him to a court's disciplinary power.

Yet, whatever may be the theoretical difficulties, a district court at this late date must conclude that if the federal prosecutor unlawfully seizes property for use in a criminal prosecution, then even before an indictment is returned (that is, when the criminal prosecution is *in posse* but not *in esse*) the party aggrieved has an "independent" action. *Di Bella* v. *U.S.*, 369 U.S. 121. Such an action is a civil matter and should be so docketed. *U.S.* v. *Koenig*, 5th Cir., 290 F. 2d 166, 169; *Centracchio* v. *Garrity*, 1st Cir., 198 F. 2d 382, 385. Cf. *Bolger* v. *U.S.*, et al., S.D.N.Y. 189 F. Supp. 237, 242. Yet it may not in all aspects be subject to the Federal Rules of Civil Procedure. *Di Bella* v. *U.S.*, 369 U. S. 121, 129, note 8. And the adjudication of the trial court is immunized from appellate review, not by statutory but by judicial exception. *Di Bella* v. *U. S.*, Ibid., particularly pp. 132-133.

Perhaps it is not too late to suggest that the best way of beginning such an action is to name as the party respondent the prosecutor and not the United States. See *Go-Bart Importing Co.* v. *U. S.*, 282 U. S. 344, 355, lines 8-10. At any rate if an injunction is to be issued, it would seem that it should bind only individuals and not the sovereign. But it cannot be denied that there are many cases where no such limitation appears to have been recognized.

It certainly is not inappropriate that the initial pleading should take the style of a "complaint" rather than

a "motion". A "motion" inevitably suggests that there is already in being some case in the course of which the motion is pleaded as a second or later procedural step. The word "complaint" or "petition" is a more correct description of the opening gambit.

But in the case at bar the difficulty jurisdictionally is that the complaint does not name the federal prosecutor, or even, as in some of the heretofore cited cases, the United States. The only respondents are federal enforcement agents of the Internal Revenue Service. They are not members of the bar of this Court and in that sense officers of this Court subject to its disciplinary power. Nor are the defendants subject to the control of the United States District Attorney. See *Go-Bar Importing Co.* v. *U. S.*, 282 U. S. 344, 354, last 2 lines.

It might have been thought better not to embrace within the anomalous jurisdiction just described any alleged unlawful seizures by federal enforcement officers. Perhaps against them could be invoked some statutory basis of federal jurisdiction (see *Cleary* v. *Bolger*, 371 U. S. 392, 396, footnote 7, 414, footnote 3); or it might be sufficient for the aggrieved person to be left with an objection to the introduction of the seized property or its fruits in evidence in any administrative, civil, or criminal trial.

However, it seems to this Court that the Supreme Court either has extended or will extend the anomalous jurisdiction so as to reach unlawful seizures by a federal agent connected with the enforcement of law, who should have observed "standards for law enforcement" established by "the federal Rules governing searches and seizures." *Rea* v. *U.S.*, 350 U.S. 214, 217-218 (federal narcotics agent); *Bolger* v. *Cleary*, 2nd Cir., 298 F. 2d 368, 369 (interpreta-

tion by Clark C.J., of *Rea*). See, however, the diverse views of Harlan J. and Brennan J. in *Cleary* v. *Bolger*, 371 U. S. 392, 396-398, 414. Compare Note, 76 Harv. L. Rev. 1656, 1664-1666; Note 77 Harv. L. Rev. 62, 149-152. In *Rea* after a defendant had successfully moved in a federal court for the return and suppression of evidence, that court, in connection with a contemptuous defiance of that order, was held to have jurisdiction to enjoin a specific federal enforcement agent from using "his illegal search and seizure as the basis of testimony in the state court." *Rea* v. *U. S.*, 350 U. S. 214, 217. That holding may be viewed narrowly, as Justice Harlan and the Harvard Law Review notes suggest, or may be broadly applied as Justice Brennan and Judge Charles E. Clark agreed in upholding Judge Frederick van Pelt Bryan's judgment in *Bolger* v. *United States of America, Robert G. Anderson, Secretary of the Treasury of the United States of America, Customs Agents William J. O'Shea and Thomas F. Loughman, Customs Enforcement Officers Walter J. Conlon and Joseph E. Patterson and Dorothy T. Zecha, Shorthand Reporter, in charge of office of Supervising Agent of Customs, Port of New York and Michael Cleary, S.D.N.Y.*, 189 F. Supp. 237, 242 (customs agents). To this Court, the indications are that the Supreme Court intends that where a federal criminal prosecution is probable a federal trial court shall have non-statutory jurisdiction to enjoin federal enforcement officers from holding or using property they unlawfully seized.

Such non-statutory jurisdiction must be exercised subject to equitable principles. *Centracchio* v. *Garrity*, 1st Cir. 198 F. 2d 382. Often—perhaps usually—it will be more prudent for a trial court to await the return of an indictment before granting any relief. For in many cases the trial court may not be persuaded that the substantial risk

facing the aggrieved person is a criminal prosecution, as distinguished from an administrative or civil proceeding.

Here, however, this Court is persuaded that indictment is probable and that jurisdiction should be exercised.

Moreover, not merely McGarry and the other clients, but the younger Lord have a standing to bring a complaint. The clients owned the records and obviously had an immediate interest. Lord as their possessor, also had an interest judicially recognized. *Jones* v. *U. S.*, 362 U. S. 257, 267.

Jurisdiction and standing to sue being found to exist, it is appropriate to turn to the merits.

In the instant case no adequate basis for the seizure of the clients' records existed. There was no search warrant. The summons does not purport to be a warrant or its equivalent; and in any event it only commands Lord to bring the records with him to another city 12 days later than the date the records were seized. There is no statutory or common law authority under which Flattery claims, or ever did claim, the right to seize the records. There was no arrest to which the seizure could be incidental. Nor was consent effectively given to the taking of those records.

If it were necessary to decide the point, this Court would hold that Lord himself never gave consent. Intimidated by Flattery's statements and implied threats, Lord did not regard himself as having a free choice whether to allow Flattery to remove the records. When a special agent of the Internal Revenue Service tells an accountant who, so far as appears, is quite innocent of wrongdoing, that unless he turns over his clients' records and cooperates with the Internal Revenue Service the accountant will

be in trouble, the agent is close to extortion. That Flattery did exercise unlawful pressure is proved by Lord's credible testimony.

But even if Lord had freely consented to allow Flattery to remove the records, that consent would have been of no significance. Lord was an agent to whom the clients had entrusted their records for the sole purpose of preparing their tax returns. He lacked, and Flattery, as an experienced special agent familiar with the usual scope of an accountant's authority, could infer that Lord had not been given, express or implied power to deliver those records to third persons. Indeed Lord initially told Flattery that he had no authority from his clients to hand over documents. Yet, with this awareness, Flattery induced Lord in breach of his duty to his principals to deliver to the Internal Revenue Service their records.

Even if Flattery had not known of the limitation on Lord's authority, inasmuch as the delivery by Lord on Flattery's demand was beyond the scope of Lord's actual or apparent authority, such delivery was without the consent of the clients and the taking by Flattery constituted an unlawful seizure violative of the clients' rights under the Fourth Amendment. *U. S.* v. *Lagow*, S. D. N. Y., 66 F. Supp. 738, aff'd 2nd Cir., 159 F. 2d, 245. See cases collected in Note 31 ALR (2d) 1088, 1091 and in Note 221 to U.S.C.A. reprint of U. S. Constitution, Amendment 4.

A fortiori, inasmuch as Flattery was aware of the limitation of Lord's authority, Flattery's conduct amounted to a tortious conversion of the clients' records and a tortious inducement of breach of confidential contractual relations between the clients and the accountant, *Union Old Lowell Nat. Bk.* v. *Paine*, 318 Mass. 313, 325; Restatement, Agency,

2nd, §312, comments c and d, § 395. Hence, on that further ground Flattery's acquisition of the clients' records was an unlawful seizure violative of the clients' rights under the Fourth Amendment.

Defendants make much of the asserted relevance of their statutory right as delegates of the Secretary of the Treasury "to examine any books * * * material to any inquiry" in a tax matter. 26 U. S. C. § 7602. No doubt, by proper application to a Court of competent jurisdiction, the agents of the Internal Revenue Service could have that right enforced, even if the taxpayers' or clients' records were in the hands of an accountant. But here the suggestion is that, unarmed with any judicial or administrative order, without the consent of a taxpayer, and without giving him a chance to be heard, an Internal Revenue Service agent may examine any of the taxpayer's records, even those in the hands of an independent professional agent for a limited purpose. There is no need for this Court to rule upon that suggestion in the case at bar, for here the complaint is not against looking at the records before taking them, but at taking them and then looking.

The seizures having been unlawful, this Court must grant the prayer that there shall be returned to the clients, or, rather, their agent, Lord, their records. But it does not automatically follow that it is appropriate for this Court to suppress the use of these records in evidence at any future criminal or other trial.

It is to be recalled that Flattery knew of these records before they were delivered to him. More significantly, he had already signed a summons covering those records. Had he waited patiently, the records, no doubt, would have been produced in response either to the administrative

summons or to a judicial order enforcing such administrative summons—for it is difficult to imagine any excuse for non-production of records so obviously relevant to a standard administrative procedure.

The only ground for suppressing the use of these records in evidence is not to allow the Government to gain advantage from violating the Bill of Rights and those high standards of fair play which should govern men entrusted with official power. The owner of the records is entitled to be as well off as if Flattery had not unlawfully seized those papers, but he is not entitled to be any better off. He is not entitled to gain perpetual immunity from ever responding, in any future criminal proceeding or civil suit or administrative, tax inquiry, to an appropriate summons to produce those records which the tax statute require him to keep and which before the unlawful seizure the Government knew he had.

If it be argued that the Internal Revenue Service should be taught a lesson and penalized for Flattery's misconduct, there are many answers, of which the best is that exclusionary rules of evidence are designed not as punishment but to prevent the public prosecutor from using "dirty hands" to achieve a conviction. Moreover, Flattery has acknowledged his error in open court, and it is unlikely that, at least in this District, Internal Revenue Service special agents will soon again, without a warrant, subpoena, or summons, take from accountants their clients' records unless the Internal Revenue Service has proof that the accountants are acting with the express or implied authority of their principals.

So that the complainants may be as well off as, but not better off than, before the unlawful seizures, this Court's

order will enjoin any defendant or any federal agent in concert with him from using in any proceeding, criminal, civil, or administrative, federal or state, information or clues derived from the records while Flattery and his associates in the Internal Revenue Service were holding them. Cf. *In re Rea*, 250 U. S. 214. But nothing in that injunction shall preclude the United States or its agents from requiring, by appropriate warrant, subpoena, summons, or other due process of law, a complainant to produce any record covered by the summons which Flattery signed before he made the unlawful seizure, or shall preclude the United States or its agents from using the contents of or clues furnished by a production later than November 19, 1963. If it be said that this Court's order calls to mind Southey's poem on the Battle of Blenheim, the only response is that while the complainants may be disappointed that they have not won immunity, they have vindicated the right of an independent accountant's clients not to have their papers taken by arbitrary, high-handed methods of tax enforcement.

This Court will not grant so much of the complainants' prayer as seeks to suppress oral statements alleged to have been made by Lord at the time Flattery examined and seized the records or at other times. No adequate evidence of any such oral statements was offered. Nor is it clear that the clients have such an interest in those statements as to give them a *locus standi*. Lord himself might have a standing to be heard. See Judge Learned Hand in *In re Fried*, 2nd Cir., 161 F. 2d 453, 465. But the jurisdiction of this Court to enjoin the use of a coerced statement, were its existence adequately proved, is a subject not free from doubt. See Frankfurter J., in *Di Bella* v. *U. S.*, 369 U. S. 121, 128. In this circuit equitable jurisdiction, at least,

has been denied. *Centracchio* v. *Garrity*, 1st Cir., 198 F. 2d 382, 386-389. Accord. *Benes* v. *Canary*, 6th Cir., 224 F. 2d 470. Elsewhere even federal jurisdiction has been questioned. See Harlan J. in *Cleary* v. *Bolger*, 371 U. S. 392, 396, footnote 7, 398-399; and Friendly J. in *Grant* v. *U. S.*, 2nd Cir., 282 F. 2d 165, 168, col. 2. But those authorities may not represent the views of the Supreme Court today. See Brennan J. in *Cleary* v. *Bolger*, 371 U. S. 392, 414, footnote 3.

> *So much of the complaint granted as prays for the return of complainants' records to Lord, and for the suppression from use in evidence by the Government of any information or clues gathered while those records were in the Government's custody, without prejudice to the right of the Government hereafter to proceed by warrant, summons, or other due process to require complainants to produce the records covered by Flattery's subpoena.*

C E Wyzanski, Jr. D.J.
United States District Judge

APPENDIX C

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 6307.

DONALD R. LORD ET AL.,

PLAINTIFFS, APPELLANTS,

v.

ALVIN M. KELLEY ET AL.,

DEFENDANTS APPELLEES.

ORDER OF COURT

July 13, 1964

This cause came on to be heard on appeal from the United States District Court of the District of Massachusetts, and was agreed by Counsel.

Upon consideration whereof, It is now here ordered as follows: The appeal is dismissed for want of jurisdiction.

By the Court:

/s/ ROGER A. STINCHFIELD
Clerk